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IN THE
SUPREME COURT FOR THE UNITED STATES

October Term 1973

No. _____

ALLEN PARK PUBLIC SCHOOLS, et al,

Petitioners,

-vs-

RONALD BRADLEY, et al,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners Allen Park Public Schools, et al, Southfield Public Schools and School District for the City of Royal Oak respectfully pray that a Writ of Certiorari issue to review the decision rendered in this cause on June 12, 1973, by the United States Court of Appeals for the Sixth Circuit. The United States Court of Appeals for the Sixth Circuit decreed that a finding of *de jure* segregation with respect to the internal operation of a single school district permits a United States District Court to *use* other geographically and politically separate, identifiable and unrelated school districts, with regard to which there is no claim or finding of segregative actions, for the purpose of fashioning a desegregation remedy designed to effectuate a majority white-minority black racial balance.

OPINIONS AND ORDERS BELOW

The Ruling On Issue of Segregation entered September 27, 1971, appears in the Appendix at 17a* and is reported at 338 F. Supp 582 (E.D. Mich-1971).

The Ruling and Order On Petitions for Intervention setting forth conditions on intervention entered March 15, 1972, is unreported but appears in the decision of the United States Court of Appeals for the Sixth Circuit herein appealed from in the Appendix at 232a.

The Ruling On Propriety of Considering A Metropolitan Remedy to Accomplish the Desegregation of the Public Schools of the City of Detroit, entered March 24, 1972, is unreported and appears in the Appendix at 48a.

The Findings of Fact and Conclusions of Law On Detroit-Only Plans of Desegregation entered March 28, 1972, is unreported and appears in the Appendix at 53a.

The Findings of Fact and Conclusions of Law In Support of Ruling On Desegregation Area and Development of Plans and Ruling on Desegregation Area and Order for Development of Plan of Desegregation entered June 14, 1972, appear in the Appendix at 59a and 97a respectively and are reported at 345 F. Supp. 914 (E.D. Mich-1972).

The Opinion of the United States Court of Appeals for the Sixth Circuit decided and filed on June 12, 1973, ___F2d___(1973), appears in the Appendix at 110a. The Judgment of the United States Court of Appeals for the Sixth Circuit entered June 12, 1973, is unreported and appears in the Appendix at 244a.

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*Appendix references followed by the letter "a" refer to the separate Appendix filed herewith. Appendix references followed by the letters "aa" refer to the Appendix to this Petition commencing at page 1aa hereof..

Opinions of the United States Court of Appeals for the Sixth Circuit rendered at prior stages of the present proceedings are reported at 433 F2d 897; 438 F2d 945; 468 F2d 902, cert denied 409 U.S. 874 (1972).

JURISDICTION

The Judgment of the United States Court of Appeals for the Sixth Circuit was entered on June 12, 1973. This petition for certiorari was filed within ninety (90) days of that date.

This Court's jurisdiction is invoked under 28 USC § 1254(1).

STATEMENT OF QUESTIONS PRESENTED

I.

ASSUMING, ARGUENDO, A *DE JURE* SEGREGATED PUBLIC SCHOOL SYSTEM IN OPERATION IN DETROIT, CAN THE VESTIGES OF SUCH SEGREGATION BE ELIMINATED AND THE DETROIT PUBLIC SCHOOL SYSTEM BE CONVERTED TO A UNITARY SYSTEM UNDER A DESEGREGATION PLAN LIMITED TO SAID SCHOOL DISTRICT?

II.

WHERE A *DE JURE* SEGREGATED PUBLIC SCHOOL SYSTEM IS FOUND IN OPERATION IN THE CITY OF DETROIT SCHOOL DISTRICT, DOES THE UNITED STATES CONSTITUTION REQUIRE OR PERMIT A UNITED STATES DISTRICT COURT TO ISSUE A DESEGREGATION ORDER EMBRACING UP TO EIGHTY-FIVE (85) OTHER GEOGRAPHICALLY AND POLITICALLY SEPARATE, IDENTIFIABLE AND UNRELATED SCHOOL DISTRICTS AND REQUIRING THE FORCED REASSIGNMENT AND CROSS-DISTRICT TRANSPORTATION OF HUNDREDS OF THOUSANDS OF CHILDREN, ABSENT (i) ANY CLAIM OR FINDING THAT SUCH OTHER SCHOOL DISTRICTS HAVE FAILED TO OPERATE UNITARY SCHOOL SYSTEMS, AND (ii) ABSENT ANY CLAIM OR FINDING THAT THE BOUNDARY LINES OF ANY SCHOOL DISTRICTS WERE ESTABLISHED WITH THE PURPOSE OF CREATING OR FOSTERING RACIAL SEGREGATION IN THE PUBLIC SCHOOLS?

III.

DOES THE FAILURE TO ACCORD PETITIONERS' SCHOOL DISTRICTS, AGAINST WHOM RELIEF IS IMPOSED, A MEANINGFUL OPPORTUNITY TO PRESENT EVIDENCE AND BE HEARD ON ALL CONTROLLING ISSUES, INCLUDING THE ISSUE OF SEGREGATION, A "DETROIT-ONLY" PLAN OF DESEGREGATION AND THE PROPRIETY OF A SO-CALLED METROPOLITAN REMEDY TO DESEGREGATE THE DETROIT PUBLIC SCHOOL SYSTEM, DENY PETITIONERS DUE PROCESS OF LAW?

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The constitutional provisions, statutes and rules relevant to the issues in this case are: U.S. Constitution, Amendment V; U.S. Constitution, Amendment XIV, Section 1; Michigan Constitution, Art VII, Sec 2; Judicial Code, 28 U.S.C., Section 1254(1) and Section 1292(b); Fed. R. Civ. P. 19 and 54(b); Michigan Compiled Laws, Section 340.352; Act 34, Section 28, Michigan Public Acts of 1867; Act 319, Part II, Chapter 2, Section 9, Michigan Public Acts of 1927; Act 48, Section 12, Michigan Public Acts of 1970, which are set forth in relevant part in the Appendix to this Petition For Writ Of Certiorari.

STATEMENT OF THE CASE

Petitioners are forty-two (42) separate, unrelated and identifiable school districts in Wayne, Oakland and Macomb Counties within varying degrees of geographical proximity to the city of Detroit. Each of Petitioners' school districts is a body corporate organized and existing pursuant to the Constitution and laws of the State of Michigan.[1] Each of said school districts is governed by its respective duly elected Board of Education. There is no claim or finding that any of the Petitioners has failed to operate a unitary school system or that any of the Petitioners' school district boundaries were established for the purpose of fostering racial segregation in the public schools. The complaint in this cause asserts no claim respecting Petitioners and makes no claim for relief against Petitioners. Petitioners are before this Court because the United States District Court and the United States Court of Appeals for the Sixth Circuit have decreed that simply because Petitioners have a predominantly white student population they can be *used* for the purpose of changing the racial composition of the Detroit public school system from predominantly black to predominantly white.

This action was commenced by the filing of a complaint by the plaintiffs on August 18, 1970. The defendants named in the complaint are the Governor of the State of Michigan, the Attorney General of the State of Michigan, the Michigan State Board of Education, the Superintendent of Public Instruction for the State of Michigan, the Board of Education of the City of Detroit, and its then members, and the Superintendent of the Detroit Public Schools.

The complaint is directed solely at the Detroit public school system and alleges that as a result of actions and policies of the Detroit Board of Education and a section of Act No. 48 of the Public Acts of Michigan, 1970,[2] said school system is not being

[1] Michigan Complied Laws, Section 340.352. Appendix 2aa.

[2] Said Act applied only to so-called First Class school districts in the State of Michigan. The City of Detroit School District is the only First Class school district in the State, *Bradley et al.* v. *Milliken et al.*, 433 F2d 897, 900 (CA6, 1970). The effect of one section of the Act was to delay implementation of a proposed plan to effect a more balanced distribution of black and white students in certain Detroit senior high schools (Appendix, 110a-111a).

operated on a unitary basis. No claim is made with regard to any other school district, nor is any claim made that the establishment or operation of any other school district has any causal connection with the alleged failure to operate a unitary school system within the Detroit school district. No relief is sought against any school district other than Detroit. As of August 30, 1973, the complaint has never been amended.

Before trial on the issues framed by the complaint even commenced plaintiffs appealed from denial of plaintiffs' request for a preliminary injunction to the United States Court of Appeals for the Sixth Circuit seeking to require implementation of the Detroit Board of Education's proposed plan to effect a more balanced ratio of black and white students in certain senior high schools. The Court of Appeals *sua sponte* declared that Section 12 of Act 48 was unconstitutional because it delayed implementation of the Detroit Board of Education plan. *Bradley et al.* v. *Milliken et al.*, 433 F2d 897 (CA6, 1970).

Trial on the merits limited to the issue of segregation in the Detroit public school system[3] commenced on April 6, 1971, and concluded on July 22, 1971. During the course of said trial, Intervenors Denise Magdowski, et al, moved to join eighty-four (84) school districts in Wayne, Oakland and Macomb Counties, including Petitioners herein, as parties. The District Court never granted or denied such motion.

On September 27, 1971, the District Court issued a "Ruling On Issue of Segregation" (Appendix, 17a) finding "a *de jure* segregated school system *in operation in the City of Detroit*"[4] (Appendix, 38a).

The District Court stated that the principal causes for the segregation found to exist in Detroit were population movement and housing patterns –

> "... A current condition of segregation exists .. The principal causes undeniably have been population movement and housing patterns, but state and local governmental ac-

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[3] "Ruling On Issue of Segregation" (Appendix, 18a)

[4] Emphasis added.

tions, including school board actions, have played a substantial role in promoting segregation. . ." (Appendix, 33a).

On November 5, 1971, the District Court issued an order which foreshadowed a dramatic change in the nature of the proceedings. Despite having conducted a trial limited to the issue of unlawful segregation in the Detroit school system and having made findings limited to such issue, the District Court ordered the State Defendants to submit a so-called metropolitan plan of desegregation. By judicial fiat eighty-five (85) geographically and politically independent school districts, located in three (3) counties and encompassing an area of approximately 1,000 square miles, were suddenly faced with the prospect of being subjected to a judicial order without any claim or finding that they had engaged in any unconstitutional acts, or that their establishment or existence was the product of unconstitutional acts, and without any opportunity for hearing. Pursuant to the aforementioned order, on or about February 4, 1972, a so-called metropolitan plan of desegregation was filed with the District Court.

On February 9, 16 and 17, 1972, respectively, Petitioners filed motions to intervene for the purpose of representing their interests and those of the parents and children situate in said school districts. Hearing on said motions to intervene was held on February 22, 1972. On March 15, 1972, after hearing on a Detroit-only plan of desegregation had commenced, the District Court granted Petitioners' motions to intervene as a matter of right but imposed conditions thereon which denied Petitioners any meaningful opportunity to be heard on the controlling issues.[5] No such conditions had been imposed on prior intervenors. Petitioners filed written objections to the imposition of such conditions which have not been ruled upon by either the District Court or the Court of Appeals.

Upon being granted right to intervene on March 15, 1972, the District Court advised Petitioners that they had one week, until March 22, 1972, to file briefs with respect to the legal propriety of a metropolitan plan for desegregation of the Detroit public

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[5] *Bradley et al* v. *Milliken et al*, ____F2d____(CA6, June 12, 1973), Appendix at 208a-209a and 232a-233a.

school system. On March 24, 1972, two days after the submission of briefs, the District Court issued a "Ruling On Propriety of Considering A Metropolitan Remedy to Accomplish Desegregation of the Public Schools of the City of Detroit" (Appendix, 48a).

The District Court commenced taking testimony on a metropolitan plan to desegregate the Detroit school system at 10:10 a.m. on March 28, 1972. Two (2) hours after Petitioners had first appeared in the District Court and before completion of testimony of a single witness, the District Court announced that all counsel could stop by the Court's chambers and pick up its "Findings of Fact and Conclusions of Law On Detroit-Only Plans of Desegregation" (Appendix, 53a). The District Court—relying principally on *Bradley* v. *Richmond*, 338 F. Supp. 67 (1972), reversed 462 F2d 1058 (4th Cir., 1972), *aff'd.* by equally divided Court —U.S. —(May 21, 1973)—declared that without regard to their status as independent and unitary school systems, Petitioners and other school districts could be used to counterbalance the racial mix extant within the Detroit school district.

On June 14, 1972, the District Court issued "Findings of Fact And Conclusions of Law In Support of Ruling On Desegregation Area and Development of Plans" (Appendix, 59a) and "Ruling On Desegregation Area and Order for Development of Plan of Desegregation" (Appendix, 97a).

The District Court fashioned a desegregation remedy embracing the City of Detroit school district and fifty-three (53) other separate, unrelated and identifiable school districts within a 700 square mile area, without regard to its finding that –

> "It should be noted that the court has taken no proofs with respect to the establishment of the boundaries of the 86 public school districts in the counties of Wayne, Oakland and Macomb, nor on the issue of whether, with the exclusion of the city of Detroit school district, such school districts have committed acts of de jure segregation." (Appendix, 59a-60a).

The scope of the remedy was not predicated upon the nature of the violation found but had as its central purpose the restructuring of the student population among the various school districts in order to achieve a racial balance substantially proportionate to the

black-white ratio of students within the geographical area selected by the District Court. Such purpose is patently expressed by the District Court, as follows:

> "Within the limitations of reasonable travel time and distance factors, *pupil reassignments shall be effected* within the clusters described in Exhibit P.M. 12 so as to achieve the greatest degree of actual desegregation *to the end that, upon implementation, no school, grade or classroom b[e] substantially disproportionate to the overall composition.*" (Appendix, 101a-102a). Emphasis added.

On July 11, 1972, the District Court ordered the Detroit Board of Education to enter into a contract for the purchase of at least 295 school buses within two (2) days with the financial obligation for said purchase to be borne by the State Defendants (Appendix, 106a-107a).[6] Said purchase was to be made for the purpose of providing transportation under an interim plan not yet *in esse* (Appendix, 106a).

On July 19, 1972, the District Court certified that the orders listed below involve controlling questions of law, as provided by 28 U.S.C. 1292 (b), and made a determination of finality under Rule 54 (b), Fed. R. Civ. P.:

(1) Ruling on Issue of Segregation, dated September 27, 1971 (Appendix, 17a).

(2) Findings of Fact and Conclusions of Law On Detroit-Only Plans of Desegregation (Appendix, 53a).

(3) Ruling On Propriety of Considering A Metropolitan Remedy to Accomplish Desegregation of the Public Schools of the City of Detroit (Appendix, 48a).

(4) Ruling On Desegregation Area and Development of Plans and Findings and Conclusions of Law In Support Thereof (Appendix 59a and 97a).

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[6] This order was stayed by the Court of Appeals for the Sixth Circuit on July 20, 1972 (Appendix 112a; 113a-114a).

(5) Order directing purchase of at least 295 school buses (Appendix, 106a).

Appeal was taken from the aforementioned orders and on December 8, 1972, the United States Court of Appeals for the Sixth Circuit rendered an opinion, by a panel of three judges, affirming the Ruling On Issue of Segregation (Appendix, 17a) and Findings of Fact and Conclusions of Law On "Detroit-Only" Plans of Desegregation (Appendix, 53a). The decision of the panel vacated the remaining orders appealed from, but affirmed in principle the ruling of the District Court that Petitioners and other school districts could be used to alter the racial balance in the Detroit school district (Appendix, 111a-112a).

On January 16, 1973, the Court of Appeals for the Sixth Circuit granted rehearing *in banc* which had the effect of vacating the previous opinion and judgment of the court (Appendix, 112a). Oral arguments before the court *in banc* were heard on February 8, 1973. and the decision of the court issued on June 12, 1973, Petitioners seek a Writ of Certiorari to review said decision.

By majority decision the Court of Appeals for the Sixth Circuit affirmed the Ruling On Issue of Segregation, dated September 27, 1971, (Appendix, 17a) and the Findings of Fact and Conclusions of Law On "Detroit-Only" Plans of Desegregation (Appendix, 53a). The Court of Appeals further affirmed in principle the ruling of the District Court that Petitioners and other school districts may be included in a remedy for the desegregation of the Detroit public school system.

A substantial number of the fifty-three (53) school districts covered under the District Court's order (Appendix, 101a) have never been parties to these proceedings. The Court of Appeals declared that any school district to be affected by the decree of the District Court is a necessary party under Rule 19, Fed. R. Civ. P. (Appendix, 177a) and as a pre-requisite to implementation of a multi-school district remedy, school districts to be affected must be made a party to the litigation and afforded an opportunity to be heard (Appendix, 177a).

The Court of Appeals, while stating that affected school districts[7] must be afforded an opportunity to be heard, so circumscribes such right as to render it meaningless. The Court of Appeals states that –

> "... the District Court will not be required to receive any additional evidence as to the matters contained in its Ruling on the Issue of Segregation, dated September 27, 1971, and reported at 338 F. Supp. 582, or its Findings of Fact and Conclusions of Law on the 'Detroit-only' plans of desegregation, dated March 28, 1972." (Appendix, 178a).

The net result is that Petitioners and other school districts are foreclosed from any hearing whatever with respect to the controlling issues. The final remedy is, in fact, already ordained by the Court of Appeals.

REASONS FOR GRANTING THE WRIT

The Decision Below Presents Issues of Imperative Public Importance That Have Never Been Decided By This Court

This case is without precedent in terms of the scope of the judicial remedy involved, the failure to accord Petitioners fundamental due process, the imposition of a judicial remedy against unitary school districts absent a finding of constitutional violation and its impact upon the public school systems in the United States.

There are upwards of 600 geographically and politically unrelated, separate and identifiable school districts in the State of Michigan. Over 100 years ago the Michigan legislature in Public Act No. 34 of 1867, provided that –

> "All residents of any district shall have an equal right to attend any school therein."

The Michigan Supreme Court construed this statute to mean that

[7] A motion which would make eighty-four (84) school districts in Wayne, Oakland and Macomb Counties parties to the litigation is now pending before the District Court.

under Michigan law black children were placed on the same footing with white children and were admissible on the same terms to the public schools. *Ex Rel Workman*, 18 Mich. 399 (1869).

In 1927 the Michigan legislature enacted Act No. 319, Part II, Chapter 2, Section 9 of which provided as follows:

> "All persons residents of any school district and five years of age, shall have an equal right to attend any school therein; and no separate school or department shall be kept for any person or persons on account of race or color."

This long established policy against racial segregation in the public schools is re-affirmed in the Michigan Constitution, as follows:

> ". . . Every school district shall provide for the education of its pupils without discrimination as to religion, creed, race, color or national origin." Mich. Const. 1963, art VIII, sec 2.[8]

The complaint filed in this case alleges that *one* of the 600 Michigan school districts, the City of Detroit, has failed to operate a unitary school system. The trial on the merits was confined to the issue of *de jure* segregation with respect to the operation of the Detroit public school system. The gravamen of the findings and conclusions of the District Court, and the decision of the Court of Appeals, is that the Detroit Board of Education, by the use of various techniques such as the manipulation of student attendance zones within the Detroit school district, school site selection and creation of optional attendance areas, deliberately fostered and maintained racially segregated schools within the Detroit school district, aided or abetted by the action or inaction of the State Defendants.

Neither the District Court nor the Court of Appeals made any findings that any of the Petitioners, or any other school district save Detroit, have defaulted in their constitutional obligation to maintain a unitary school system. The District Court stated explicitly that –

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[8] "The anti-discrimination clause is placed in this section as a declaration which leaves no doubt as to where Michigan stands on this question." State of Michigan Constitutional Convention, 1961, *Official Record*, Volume II, page 3395.

"It should be noted that the court has taken no proofs with respect to the establishment of the boundaries of the 86 public school districts in the counties of Wayne, Oakland and Macomb, nor on the issue of whether, with the exclusion of the city of Detroit school district, such school districts have committed acts of de jure segregation." (Appendix, 59a-60a).

The Court of Appeals for the Sixth Circuit has decreed that, contrary to controlling decisions of this Court, the scope of judicial remedy in a school desegregation case is not dependent upon any constitutional violation, but can be predicated on the existence of racial imbalance between separate, unrelated and identifiable school districts.

Admittedly, the City of Detroit school district is predominantly black and Petitioners and some other school districts are predominantly white. However, there is no claim or finding that the *de jure* segregated operation of the Detroit school system is in any way causally connected with the establishment or operation of any other school district. There is likewise no claim or finding that the creation or establishment of any other school district is causally connected with the *de jure* segregated operation of the Detroit school district.

An obvious and simple fact ignored by the District Court and the Court of Appeals is that there is absolutely no evidence that the racial make-up of the Detroit school district vis-a-vis other school districts would be any different had none of the acts of *de jure* segregation here found occurred. In other words, had Detroit been operated as a unitary school system its total school population would still be predominantly black due to population movements and housing patterns. Only the racial mix *in schools within the City of Detroit* might be different but for the manipulative actions found by the District Court.

The evil intended to be eradicated by the decision of the Court in *Brown* v. *Board of Education of Topeka*, 347 U.S. 483 (1954), and its descendants, was the label of inferiority which accompanied the segregation of black children in the schools by *"sanction of law"*. It is not the mere presence of too many or too few black children in a school that gives rise to a constitutional

violation, but the use of governmental action to deny black children entrance to a school or classroom solely because of their race. Such evil is given rebirth by a decision such as the Court of Appeals herein that black children must not be permitted to predominate in any school system. In *Brunson* v. *Board of Trustees of School District No. 1 of Clarendon County, South Carolina*, 429 F2d 820, 826 (CA4, 1970), Judge Sobeloff appropriately described the actual effect of such a holding, as follows:

> "This idea, then, is no more than a resurrection of the axiom of black inferiority as justification for separation of the races, and no less than a return to the spirit of *Dred Scott*."[9]

Both the District Court and the Court of Appeals acknowledge the lack of controlling decision by this Court with respect to the remedy decreed herein.

> "The main thrust of the objections to the consideration of a metropolitan remedy advanced by intervening school districts is that, absent a finding of acts of segregation on their part, individually, they may not be considered in fashioning a remedy for relief to the plaintiffs. It must be conceded that *the Supreme Court has not yet ruled directly on this issue*..." United States District Court, Eastern District of Michigan, Southern Division (Appendix, 50a). Emphasis added.

* * *

> "[A]mong the substantial questions presented there is at least one difficult issue of first impression that has never been decided by this court or the Supreme Court." United States Court of Appeals for the Sixth Circuit (Appendix, 113a).

The decision of the Court of Appeals portends the cross-school district assignment and transportation of hundreds of thousands of children in the Detroit metropolitan area. The initial desegregation plan contemplated by the District Court embraces

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[9] *Dred Scott* v. *Sanford*, 60 U.S. (19 How) 393 (1856).

fifty-three (53) separate school districts and the reassignment and transportation of over 300,000 children (Appendix, 72a; 101a). The imperative public importance of this case is readily apparent when one conceives the possibility of millions of school children in school districts throughout the United States being reassigned and transported in order to effect majority white-minority black racial balance. The disruptive consequences of such occurrences are so obvious as to warrant no comment.

The Court of Appeals has remanded this case to the District Court for the purpose of implementing a plan of desegregation which could potentially involve in excess of eighty (80) school districts and approximately 1,000,000 children. At this juncture the scope of the remedy and the desegregation area is limited only by the dictates of the District Court (Appendix, 177a). Plaintiffs have already filed a motion which, if granted, would make eighty-four (84) school districts parties to these proceedings.

Obedience to the rule of law is the keystone of our republic. But what is the rule of law in cases such as the instant case? Only a decision by this Court can resolve the confusion and conflict engendered by divergent judicial commands emanating from lower courts. The issues posed in this case have substantial impact upon the lives of nearly one million children in the Detroit metropolitan area and millions of children and parents throughout the United States. This Court has stated that delay in effecting the desegregation of public school systems found to be in violation of the Constitution will not be countenanced. It is submitted that this Court should likewise not countenance delay in providing definitive and controlling guidance in connection with the immensely important public issues here presented.

The Decision Below Conflicts In Principle With Decisions Of This Court and Other Courts Of Appeals

In *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 15-16, (1970), this Court stated:

"... a school desegregation case does not differ fundamentally from other cases involving the framing of equitable

remedies *to repair the denial of a constitutional right.* The task is to correct, by a balancing of the individual and collective interests, *the condition that offends the Constitution.*

"In seeking to define even in broad and general terms how far this remedial power extends it is important to remember that judicial powers may be exercised *only on the basis of a constitutional violation.* . . .

"School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities; absent a finding of a constitutional violation, however, that would not be within the authority of a federal court. As with any equity case, *the nature of the violation determines the scope of the remedy.* . ." Emphasis added.

Assuming, *arguendo,* the validity of the findings of the District Court on the issue of segregation and the Court of Appeals affirmance thereof, the only constitutional violation in this case is the operation of the Detroit public school system on a *de jure* segregated basis which denies black children access to certain schools *within the Detroit School system* on account of their race. There is no claim or finding that black children have been denied such access in any other school district because of their race.

The condition that offends the constitution is the internal operation of the Detroit public school system. The nature of the constitutional violation is the manipulative techniques used in connection with the assignment of children to schools within the Detroit school system. The scope of the remedy should thus be limited to prohibiting the denial of access to schools within the Detroit school system on account of race and elimination of the vestiges of segregation by reassigning Detroit school children to schools on a basis which is reflective of the condition which would prevail had the Detroit system been operated as a unitary school system.

There is no claim or finding that the racial composition of the Detroit public school system vis-a-vis other school districts throughout the Detroit metropolitan area is causally connected with the actions found to constitute *de jure* segregation. With or without the acts of commission and omission by the Detroit Board of Education and the State defendants found to constitute *de jure* segregation, the Detroit school system would be predominantly black and other school districts in the Detroit metropolitan area would be predominantly white. Applying the teachings of *Swann, supra,* there is no basis upon which Petitioners and other unitary school districts can be subjected to a judicial remedy for the purpose of changing the racial mix in the Detroit public school system. Judge Kent in his dissenting opinion put it succinctly, as follows:

> "I know of no authority which would permit a Court to announce a conclusion, based upon a violation of the Constitution, absent the taking of proofs to establish such constitutional violation, which proofs the District Judge stated he did not take in this case." (Appendix, 225a).

The Court of Appeals for the Sixth Circuit has, in reality, decreed that the existence of a big city school system which is predominantly black due to residential patterns, surrounded by school districts which are predominantly white due to residential patterns, constitutes a denial of equal protection of the law. This holding is in direct and irreconcilable conflict with the pronouncements in *Spencer* v. *Kugler,* 326 F. Supp. 1235 (1971), aff'd 404 U.S. 1027 (1972), as follows:

> "... Racially balanced municipalities are beyond the pale of either judicial or legislative intervention." 326 F. Supp. 1235 at 1240.
>
> * * *
>
> "A continuing trend toward racial imbalance caused by housing patterns within the various school districts is not susceptible to judicial intervention..." 326 F. Supp 1235 at 1242.

Moreover, this Court recently stated in *San Antonio Independent School District* v. *Rodriquez,* 411 U.S. 1,54 (1973) that –

> "This Court has never doubted the propriety of maintaining political subdivisions within the States and has never

found in the Equal Protection Clause any *per se* rule of territorial uniformity [citations omitted]."

The holding of the Sixth Circuit Court of Appeals that relief from segregation in the Detroit public school system cannot be accomplished within said school district is patently erroneous. Contrary to the majority opinion of the Sixth Circuit, a unitary school system is not a minority-black system but is a school system within which no person is effectively excluded from any school or classroom because of race or color. *Alexander* v. *Holmes County Board of Education*, 396 U.S. 19 (1969). Relief of segregation can be accomplished by converting Detroit to a unitary school system. As stated by the Fourth Circuit Court of Appeals in *Bradley* v. *School Board of the City of Richmond*, 462 F2d 1058, 1069 (CA4, 1972), *aff'd* by an equally divided Court, 93 S. Ct. 1952 (1973).

> "... there is no right to a racial balance within even a single school district, *Swann* v. *Charlotte-Mecklenburg Board of Education*, supra at 24, but only a right to attend a unitary school system."

The objective of the so-called metropolitan remedy required by the holdings of the courts below is racial balancing, pure and simple. This Court in *Swann, supra*, unequivocally rejected the notion that desegregation requires racial balancing, saying:

> " ... If we were to read the holding of the District Court to require, as a matter of substantive constitutional right, any particular degree of racial balance, or mixing, that approach would be disapproved and we would be obliged to reverse." *Swann, supra*, at page 24.

The conclusion of the Sixth Circuit Court of Appeals that desegregation requires reducing the black student population of the offending school district to a minority ratio is further negated by *United States* v. *Scotland Neck Board of Education*, 407 U.S. 484 (1972), where the enrollment under the desegregation plan was 78% black and by *Wright* v. *Council of the City of Emporia*, 407 U.S. 451 (1972) where the enrollment under the desegregation plan was 66% black.

In *Bradley* v. *School Board of the City of Richmond, supra*, the Court of Appeals for the Fourth Circuit rejected adoption of a so-called metropolitan remedy aimed at using predominantly

white school districts to effect a more desirable racial balance vis-a-vis a predominantly black school district. The Court of Appeals for the Fourth Circuit noted as follows:

> "... the forces influencing demographic patterns in New York, Chicago, Detroit, Los Angeles, Atlanta and other metropolitan areas have operated in the same way in the Richmond area to produce the same result. Typical of all these cities is a growing black population in the central city and a growing white population in the surrounding suburban and rural areas. Whatever the basic causes, it has not been school assignments, and school assignments cannot reverse the trend. That there has been housing discrimination in all three units is deplorable, but a school case, like a vehicle, can carry only a limited amount of baggage. *Swann* v. *Charlotte-Mecklenburg Board of Education,* supra at 24." 462 F2d 1058, 1066 (CA4, 1972).

The decisions of the District Court and the Court of Appeals in this case are founded upon the erroneous premise that the judicial remedy in a school desegregation case need not be confined to the scope of constitutional violations but may be used as a vehicle of unlimited capacity for the purpose of effecting social goals. The District Court stated as much, saying:

> "We need not recite the many serious problems such a plan entails, suffice it to say that a plan of such dimensions can hardly be conceived in a day, to say nothing of the time it will require for implementation. A large metropolitan area such as we have in our case can not be made the subject of instant integration. We must bear in mind that the task we are called upon to perform is a social one, which society has been unable to accomplish. *In reality, our courts are called upon, in these school cases, to attain a social goal, through the educational system, by using the law as a lever."* (Appendix, 40a-41a). Emphasis added.

The mandate of *Brown I, supra,* and *Brown II,* 349 U.S. 294 (1955), is to dismantle dual school systems and eliminate the vestiges of segregation where the actions of school authorities have denied children access to public schools solely on account of their

race or color. *Brown* and its progeny have all addressed themselves to this objective. The Sixth Circuit Court of Appeals has misapprehended the controlling principles enunciated by this Court and has gone far beyond correcting the condition that offends the Constitution[10] in decreeing that children attending the public schools may be reassigned and transported for purposes of racial balancing to counteract residential patterns. The irreconcilable conflict between the decision of the Sixth Circuit Court of Appeals and prior decisions of this Court not only warrants but calls for immediate review of this case by Writ of Certiorari.

Petitioners Have Been And Will Continue To Be Denied Due Process of Law Under The Decision Below

It is impossible to equate the proceedings below with the minimal requirements of due process of law.[11] This Court has set forth such requirements, as follows:

> "A fundamental requirement of due process is 'the opportunity to be heard' . . . It is an opportunity which must be granted at a meaningful time and in a meaningful manner." *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965).
>
> * * *
>
> "The right to a fair and open hearing is one of the rudiments of fair play assured to every litigant by the Federal Constitution as a minimal requirement." *Railroad Commission of California* v. *Pacific Gas & Electric Co.*, 302 U.S. 388, 393 (1938).

The decision of the Sixth Circuit holds that Petitioners and other school districts to be affected by judicial decree are "necessary parties", yet denies to such necessary parties any opportunity for hearing with respect to the controlling issues here involved.

As noted hereinabove in the Statement of the Case, decisions of the courts below foreclose Petitioners from an opportunity to

[10] See dissenting opinion of Judge Kent, Appendix, 223a.

[11] United States Constitution, Amendment V.

be heard on the issue of segregation and the issue of a "Detroit-Only" plan of desegregation and subject Petitioners to judicial sanction without any finding that they have committed, or are causally connected with, any constitutional violation.

The Sixth Circuit decision commands the District Court to fashion a so-called metropolitan remedy to alter the racial balance vis-a-vis the Detroit school district and geographically and politically independent school districts in the geographical area proximate to the Detroit school district. Thus the ultimate remedy has been determined and the hearing to be accorded Petitioners is illusory. As stated by Judge Miller, in dissenting from the majority opinion of the Sixth Circuit–

> "Parties to be affected and against whom relief is sought should be accorded, in compliance with basic principles of due process, an opportunity to be heard at a meaningful time and in a meaningful manner not only with respect to the ultimate scope of the remedy to be fashioned, but also with respect to important, significant and perhaps even controlling issues, including the issue of segregation, a 'Detroit only' school plan and the propriety of a metropolitan remedy. If any one of these issues is resolved in favor of parties outside the Detroit School District, the nature and scope of a remedy embracing outlying districts would not be reached. Hence the outlying districts have a vital interest in each issue separately and should be heard on each in a true adversary sense. Until this is done our expression of view on the merits of the several questions is uncalled for and ill-advised. *To permit these additional parties to be heard only in the restricted sense set forth in the majority opinion is to deny them basic rights guaranteed* not only by Rule 19, Federal Rules of Civil Procedure, but *by the Constitution itself."* (Appendix, 239a-240a). Emphasis added.

The unprecedented decision of the Sixth Circuit warrants immediate review by this Court in order to determine and protect fundamental constitutional rights to due process of law.

CONCLUSION

The unprecedented decision of the Sixth Circuit Court of Appeals and its tremendous public impact on parents and children in Michigan and throughout the United States make this case one of imperative public importance warranting the issuance of a Writ of Certiorari.

Respectfully submitted,

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Dated: September 6, 1973.

APPENDIX

CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment V provides:

> AMENDMENT V – CAPITAL CRIMES; DOUBLE JEOPARDY; SELF - INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY
>
> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment XIV, Section 1, provides:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Michigan Constitution of 1963, Art. 8, § 2 provides:

> Free public elementary and secondary schools; discrimination.
>
> SEC. 2. The legislature shall maintain and support a system of free public elementary and secondary schools as defined by law. Every school district shall provide for the education of its pupils without discrimination as to religion, creed, race, color or national origin.

UNITED STATES STATUTES

Judicial Code, 28 U.S.C. § 1254(1) provides:

> 1254. Courts of appeals; certiorari; appeal, certified questions
>
> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods;
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

Judicial Code, 28 U.S.C. § 1292(b) provides:

> § 1292. Interlocutory decisions
>
> (b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

MICHIGAN STATUTES

Michigan Compiled Laws Annotated, § 340.352 provides:

> 340.352 Body corporate; powers, rights, liabilities; presumptions
>
> SEC. 352. Every school district shall be a body corporate under the name provided in this act, and may sue and be sued in its name, may acquire and take property, both real and personal, for educational purposes within or without its cor-

porate limits, by purchase, gifts, grant, devide or bequest, and hold and use the same for such purposes, and may sell and convey the same as the interests of such district may require, subject to the conditions of this act contained. As such body corporate, every school district shall be the successor of any school district previously existing within the same territorial limits and shall be vested with all rights of action, with the title of all property, real and personal, of the district of which it is the successor, and the indebtedness and obligations of the district superseded shall become and be the indebtedness and obligations of the succeeding district, except as otherwise provided in chapters 3, 4 and 5, part 2 of this act. Every school district shall in all cases be presumed to have been legally organized when it shall have exercised the franchises and privileges of a district for the term of 2 years; and such school district and its officers shall be entitled to all the rights, privileges and immunities, and be subject to all the duties and liabilities conferred upon school districts by law.

Act 34, Sec. 28, Mich. Pub. Acts of 1867 provides:

(2271) Sec. 28. All residents of any district shall have an equal right to attend any school therein: *Provided*, That this shall not prevent the grading of schools according to the intellectual progress of the pupils, to be taught in separate places when deemed expedient.

Act 48, Sec. 12, Mich. Pub. Act of 1970 provides:

388.182 Attendance provisions, implementation; conditions. [M.S.A. 15.2298(12)]

Sec. 12. The implementation of any attendance provisions for the 1970-71 school year determined by any first class school district board shall be delayed pending the date of commencement of functions by the first class school district boards established under the provisions of this amendatory act but such provision shall not impair the right of any such board to determine and implement prior to such date such changes in attendance provisions as are mandated by practical necessity. In reviewing, confirming, establishing or modifying attendance provisions the first class school district

boards established under the provisions of this amendatory act shall have a policy of open enrollment and shall enable students to attend a school of preference but providing priority acceptance, insofar as practicable, in cases of insufficient school capacity, to those students residing nearest the school and to those students desiring to attend the school for participation in vocationally oriented courses or other specialized curriculum.

Act 319, Part II, Ch. 2, Sec. 9, Mich. Pub. Acts of 1927, provides:

SEC. 9. All persons residents of any school district, and five years of age, shall have an equal right to attend any school therein; and no separate school or department shall be kept for any person or persons on account of race or color: *Provided*, That this shall not be construed to prevent the grading of schools according to the intellectual progress of the pupil, to be taught in separate places as may be deemed expedient.

FEDERAL RULES OF CIVIL PROCEDURE

Fed. R. Civ. P. 19 provides:

Rule 19. Joinder of Persons Needed for Just Adjudication

(a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If

the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

(b) Determination by Court Whenever Joinder not Feasible. If a person as described in subdivision (a) (1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

(c) Pleading Reasons for Nonjoinder. A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in subdivision (a) (1)-(2) hereof who are not joined, and the reasons why they are not joined.

(d) Exception of Class Actions. This rule is subject to the provisions of Rule 23.

Fed. R. Civ. P. 54(b) provides:

Rule 54. Judgments; Costs

(b) Judgment upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counter-claim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order

or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.